IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 34.

TEXTILE MILLS SECURITIES CORPORATION, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF FOR THE PETITIONER

EDMUND S. KOCHERSPERGER,
Counsel for Petitioner,
811 Investment Building,
Washington, D. C.

SUBJECT INDEX.

CITATIONS.

CASES:

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We reply to respondent's brief by two subdivisions, covering separately the deductible expenses and court *en banc*.

I.

THE EXPENSES IN PROMOTION OF THE SETTLEMENT ACT.

A.

Respondent's brief is largely a paraphrasing of the opinion by Judge Biggs in the Court below, which we covered by our main brief.

Additionally, however, it attempts the involvement of this petitioner in an atmosphere of prejudice before this Honorable Court by a note at pages 19 and 20 which contains charges and innuendos which hardly can be described as fitting or proper when counsel are supposed to assist the Court in attaining the ends of Justice.

At the time when we made our contracts with the citizens of Germany and through the enactment of the Settlement Act, Germany stood as a sister-republic which was struggling to attain its place by our side among the republics of the World. In that endeavor, the United States was helping them. The war-lords of the First World War had been eliminated into the discard, with their ideas of world domination, and "der Tag."

No Hitler, with his "Mein Kampf" and similar concepts for the destruction of humanity and world domination even stood as a faint star, visible at the horizon of world affairs through a powerful telescope.

We were dealing with peaceful people who seriously sought the establishment of a law-abiding democracy as their place in the sun, along with other law-abiding democracies.

Billions of American dollars had been and still were being poured into Germany in the aspiration for the sound establishment of their people under a democratic form of government, and with encouragement by the United States as a friendly government.

England itself was doing the same thing, working zealously for the re-creation of a New Germany, a different Germany, and a contented body of people—often against the policies or desires of France.

Right up to the start of this present war in 1939, England persisted in its policy of appeasement, not with the former peaceful people, *but with a Hitler.*

The fact that matters did not finally eventuate on the lines of the hopes of civilized and well-wishing people has no more relation to this case than do the acts of Napoleon or George the Third.

When the Settlement Act was enacted in 1928, the members of Congress and the representatives of claimants, American and German alike, had full confidence and complete expectation that the claimants on both sides would receive every last dollar of their just claims by force of performance through that Settlement Act.

Events through the passage of time proved otherwise—as to *both* sets of claimants. But the hopes, motives, and sound conclusions upon facts as existent in 1928 cannot in any sense of fairness be maligned by reason of facts *which first found existence many years after 1928.* Such a suggestion by respondent maligns equally the very same Congress of 1928 that enacted the Revenue Act which applies in this case.

If foresight ever could be equal to hindsight, this sorry World would be an Elysium. To our misfortune, it is not. If England had adopted a policy of German-domination through the decades following the Armistice, in place of its policy for German reconstruction and appeasement, the British Isles would not stand today as an armed camp, hourly threatened with annihilation by the despotism of Hitlerism, and all of Europe would not stand under control by Hitler.

If Congress could have foreseen in 1928 the things which began to occur in Germany in the 1930's, the Settlement Act never would have found enactment. Congress, not until 1935 by the Harrison Resolution, suspended further payments to Germans of claims under the Settlement Act.

Equally is it true that if this petitioner had possessed any means for anticipating the things which happened in 1927, as well as after 1928, *it never would have engaged upon the contracts of 1924.* In that event, this petitioner would not stand before this Court in this litigation.

But *we face facts*, and all of the unfair imputations in the respondent's note at pages 19 and 20 find most direct repudiation in the fact that the American claimants themselves *agreed to that Settlement Act* as the enactment into legislation of their Compromise Agreement with the Ger-

man claimants. (See petitioner's main brief, pp. 53-76.)

The respondent would make of this case an attempt to *punish* the petitioner for everything that has happened in the affairs of this unhappy world from the time that Hitler appeared on the scene and the German Republic crumbled into decay. If this Honorable Court agrees with such a concept of Justice, then the humble citizens represented in this petitioner must suffer the punishment in like degree as in the so-called "courts" of Germany and Russia. But we hold to our faith that this Honorable Court, regardless of present animosity in general against things-German, will decide this case upon its own merits, wholly divorced from the unfortunate fact that we happened to represent Germans under entirely different facts and conditions than now exist. We do not plead for Germans; we stand here as American citizens.

B.

Separated from such an attempt at prejudice, the questions presented in this case are not different, in the slightest degree, than if we stood before this Court as the representative of a poverty-stricken *American* claimant, who had no means for compensating us for services in promotion *of that very same Settlement Act* by a contingent contract whereby we advanced for him the necessary expenses, as his attorney-in-fact.

This case is no different from the situation of any lawyer who engages for the poor man to procure an appropriation by Congress by a private act of special legislation, the lawyer advancing his expenses and finding compensation only through a contingent contract.

C.

What the respondent, in effect, argues, and what the opinions of Judges Biggs and Clark by implication declare is that an Act of Congress *only must be the resort of the rich man*, who can pay cash regardless of the result, who can pay cash to the attorney in a volume sufficient to cover

all possible expenses, or who can pay the expenses directly himself upon the attorney's instructions.

They declare, however, that the *poor* man, who lacks such cash resources, must stand in the underprivileged class, deprived of all redress by Congress (or a State Legislature), because his only manner of compensating an attorney is out of the result. The *poor* man must stand without rights, without redress—*merely because he is poor.*

Their conception of Democracy is that resorts to the Sovereign for legislation, although granted and preserved in the Constitution itself, must stand solely as the right of the rich man, who has the cash and can pay the cash regardless of the accomplished result as to legislation.

The sole and only reason for contingent contracts in this case was that *the petitioner was representing the poor man,* who had no means for paying except as the result of the Act, from the funds held by the Alien Property Custodian, and restored (only to a partial extent) by the legislation.

D.

Throughout the monumental category of statutes and Acts of Congress, only one form of action has been condemned relative to contacts as between citizens and members of Congress, bribery. The giver and the receiver equally are punishable as penal offenses. (Criminal Code, Secs. 110, 111.)

"Lobbying" (whatever the term may mean), with the single exception of bribery, never has received the slightest degree of condemnation by Congress. Not even do our laws require the registration of a so-called "lobbyist" (whatever *that* term may mean).

Throughout the brief, the respondent repeatedly uses that expression "lobbying" as though it had a single, pernicious, or unfavorable interpretation with application to the petitioner.

Yet, it may be observed, in the very Article 262 of the Regulations here involved, a distinction is made between

"lobbying purposes" and "the promotion or defeat of legislation" as being disjunctive and separate forms of conduct.

Throughout petitioner's main brief, we repeatedly have stressed and admitted that we were engaged upon "the promotion or defeat of legislation." The Trading with the Enemy Act, by implication, invited such an activity. It was the business in which we were engaged.

We categorically and most emphatically deny that we had any connection with "lobbying" in the detrimental concept of the term, which respondent's brief continuously tries to pin upon us, to our prejudice before this Court.

The Board itself states (R. 21, 22):

> "There has been no showing that the petitioner indulged in any questionable practices in carrying out the purposes of its employment."

The pertinent facts were found by the Board as stated in a Stipulation of Facts. (R. 29-38.) Nowhere therein can that word "lobbying" be found. It is admitted there, however, that we were engaged upon "the promotion of legislation." (R. 30, 31, 32, 33, 34, 35, 36.)

The term "lobbying" is so exceedingly elastic as to various meanings that it serves no useful purpose by introduction into this case. The word "man" also is a term of comprehensive and varying meanings. The word may be used as inclusive of both sexes, or it may apply to the male sex alone, and in varying meanings.

Man, either as humanity in general, or a male of the species, is not to find condemnation because the Northwest Mounted Police "always get their man," in the sense of a criminal.

Labor and farm organizations, patriotic groups, bar associations, and many other categories of interested persons may designate their representatives as "lobbyists" when seeking contacts with Congressmen as to legislation, all in commendable and helpful situations from the standpoint of

the legislation itself. But the single "black sheep" does not cast into disrepute the entire family of sheep.

By mentioning cases dealing with bribery, criminal conduct, and actions *ultra vires* as to certain businesses, the respondent attempts to characterize the petitioner as a "black sheep," instead of an innocent, peaceful member of the sheep family, as the Record shows the petitioner to have been. The ends of Justice are not achieved by subtle means for the mere "winning of cases."

E.

Respondent repeats reliance upon "the reenactment rule," but states that rule in such varying concepts that nobody can determine from the brief what they may mean—except for another attempt to "win a case."

At page 7, they state that a Treasury ruling of long standing "must be given the effect of law unless plainly in conflict with the statute." In other words, because a thing merely is *old*, it must bind this Court as law. Age was a prominent reason for the President's reorganization plan relative to this Court iself. The mere "age" by ninety-six years of precedents under *Swift* v. *Tyson* did not preclude the decision by this Court in *Erie Railroad* v. *Tompkins*. An egg may be ancient, but respect is confined to not breaking the shell.

At page 14, they state that under "the familiar rule, the successive reenactments of the statute lend even greater weight to their validity." A matter of mere "weight" is quite different from the matter of estoppel by "long-continuedness" into "the effect of law."

At page 14, again, they state that the mere age of an administrative interpretation entitles it "to great weight."

Then, at page 15, we find a Regulation of 1928 argued for interpretation, by the action of an entirely different Congress of 1936 relative to a different section of the revenue act.

One always can accord varying degrees of "weight" to interpretations by different persons, be they Courts, Boards,

attorneys of reputation for taxpayers or Government, or jurists expressing their views in legal periodicals. Even a legislative attempt in 1941 by way of interpretation of an Act of 1864 may merit a respectful consideration. But that does not answer the questions here presented. As stated by Mr. Justice Holmes in "Collected Legal Papers," p. 207:

> "We do not inquire what the legislature meant; we ask only what the statute means. In this country, at least, for constitutional reasons, if for no other, if the same legislature that passed it should declare at a later date a statute to have a meaning which in the opinion of the court the words did not bear, I suppose that the declaratory act would have no effect upon intervening transactions unless in a place and case where retrospective legislation was allowed. As retrospective legislation it would not work by way of construction except in form."

The statement that an interpretation is entitled to "weight" is decidedly different from the assertion that it has "the effect of law." Anything having "the effect of law" is a law in itself.

Obviously, every administrative organization in government necessarily must interpret laws in the same, identical sense that members of the public who are affected by the laws must interpret those laws as best they can until courts of final resort have accorded conclusive, judicial interpretations. Such administrative organizations can bind the personnel of the organization to the interpretation and can inform the public. But, just as different persons at the top of the changing organizations are free to make new and different interpretations, in like manner is the public entitled freely to make its own interpretations. The courts have the final say in the matter.

Every interpretation by a reputable person may merit "weight," but calling an interpretation *conclusive* is "a horse of a different color." Respondent's brief straddles the issue.

F.

To the list of comments regarding "the reenactment rule" cited at page 36 of our main brief, we add:

Feller, Addendum to the Regulations Problem, 54 Har. L. Rev. 1311;
Griswold, Postscriptum, 54 Har. L. Rev. 1323.

The confusion in Taxation results in large measure from a Babel of tongues. Respondent's brief uses such terms as "regulation," "rulings," "lobbying," with absence at definitions.

We believe that the regulation problem would find a ready clarification if this Honorable Court would accord recognition to the clear distinction between a regulation by authority of Congress and an administrative interpretation which lacks explicit Congressional authority.

That distinction found emphasis by Mr. Alvord in his article on the subject of the regulations problem, 40 Col. L. Rev. 252. Mr. Alvord served as the Legislative Representative for the Treasury Department in 1928 relative to both the Settlement Act and the Revenue Act of 1928, following previous service with Congress as a Legislative Counsel. If "'weight' means anything, it well could be applied to his article.

By recent action in the Treasury Department, since the filing of our main brief, is found confirmation of Mr. Alvord's position, which also is mentioned by Professor Griswold and Professor Feller in their articles.

The distinction is between a legislative regulation and a so-called "Regulation" that is interpretative in the sense of attempted anticipation by way of a judicial construction. Year after year the Treasury Department has published "Regulations," separately covering the varied provisions of revenue acts, including in the very same publication *legislative regulations* which specifically have been authorized by Congress in specific sections or subsections of the revenue acts, and interpretations of other sections of

the revenue acts wherein Congress *has not authorized "regulations."*

Very recently the Treasury Department has published for consideration, comments, and suggestions, what is entitled "Internal Revenue Administrative Code."

That "Code" comprises 239 pages and constitutes an attempt to separate out of the Internal Revenue Code all of the provisions that deal with matters of *administration* as to the revenue laws. That "Code" omits all phases of a *interpretative* nature.

We have made a page-by-page study of this new, proposed "Code," and have found 409 instances of provisions taken from the Internal Revenue Code, where Congress specifically has authorized "the Commissioner with the approval of the Secretary" to prescribe *legislative regulations*. The removal of those provisions, out of the Internal Revenue Code into this new Administrative Code will leave no provision for "regulations" still standing in the Internal Revenue Code, if and when Congress enacts this Administrative Code into law.

When that process for reform finds completion, any attempt thereafter at the publication of *interpretations* by the Treasury Department will stand in its clear light as nothing more than an administrative *opinion* regarding the meaning of the laws, awaiting judicial decision for the conclusive answer.

The interpretative phase of so-called "Regulations," confused as they have been in the past with "legislative regulations," always has been nothing but legal opinions. The enactment of this Administrative Code will place them in their true light, boldly stripped of the former camouflage as "Regulations."

G.

Relative to the matter of "ordinary and necessary expense," there never has been *in any revenue act* an authorization by Congress that "the Commissioner with the approval of the Secretary" may prescribe regulations relative

to the interpretation of that section of the law. Any interpretation is an ordinary function of everybody who may be affected by any law.

Whatever "Regulations" may have stated in that regard, whether under the title of "Donations," or relative to Section 23 (a), always has been nothing but an *opinion*, to be judicially corrected or approved.

The Commissioner has been given authority to determine the *reasonableness* as to salaries and compensation for services rendered. There his authority ceased, with review by the Board and courts.

Whether such *opinions* be by laymen Commissioners and Secretaries (as many of them have been), or by a succeeding Congress itself, they should speak with no more weight than non-judicial opinions in general.

"Two wrongs never make for right," and a succession of erroneous, non-judicial opinions can have no effect upon a correct judicial interpretation in the administration of Justice.

H.

Respondent's brief argues that it is not "usual" for an attorney-in-fact to advance the expenses in matters of legislation and that our undertaking comprised nothing but a "gamble."

It is "usual" for people *to perform their contract obligations*, and it was *our business* to represent those claimants under our contract committments. There was far less of a "gamble" in the matter than are the day-by-day gambles in every other conceivable form of business undertaking. Lawyer, doctor, merchant, manufacturer, "gambles" daily as to whether his gross receipts will exceed his expenses. We, on the other hand, prior to 1924, had perceived a number of Acts of Congress which had accorded restorations to the former enemies. (See main brief, pp. 55-57.)

The element of uncertainty was whether the American claimants would prevail for a confiscation of the funds held by the Alien Property Custodian. Therein were the ex-

penses in question our necessity, by force of our contract committments.

We advanced the expenses for the same reason, as our compensation and reimbursement for the expenses were contingent upon the result—because we performed the service *for poor men* who had no other resources than the funds to be restored by the legislation.

I.

Respondent's brief declares that we did not sustain the burden of proof that those expenses were "ordinary and necessary."

We categorically deny the statement at page 7 of "the Commissioner's determination that these were not 'ordinary and necessary' expenses."

The Commissioner determined *no such thing.*

His sole and only determination (R. 11) was that:

> "Sums spent for the promotion of legislation are not deductible from gross income in accordance with Article 262 of Regulations 74 promulgated under the Revenue Act of 1928."

The sole and only contention by the Commissioner in the Board proceeding was that ordinary and necessary expenses were not deductible *when they involved the promotion of legislation,* by reason of Article 262 and "the reenactment rule."

There, again, does the respondent's counsel indulge in tactics that would not be countenanced if in representation of any private litigant.

The Board stated (R. 18):

> "At the hearing his counsel stated that 'the question in one sentence is whether the Board will follow that decision or whether it won't.' "

"That decision" was the *Sunset-Scavenger* case, which applied an interpretation of "the reenactment rule" with application to the Article 262.

That was the only litigated matter in the Board proceeding. That the expenses were "ordinary and necessary" never was questioned or disputed.

Further, the Board stated (R. 18) with reference to the respondent:

> "Neither does he make any claim that the expenses incurred were not in fact ordinary and necessary in performing the services required of it under its contract."

If any taxpayer must maintain a burden of proof as to an item *not claimed* by the respondent, it is a new idea in judicial procedure.

J.

At page 16, respondent contends that the expenses would not be "ordinary" unless we proved "that enterprises of this type commonly incur expenses for lobbying activity under the type of arrangement involved here."

Unless we again wage war against Germany, evolving into a German defeat, our sequestration of private property owned by Germans, their loss of all properties located elsewhere than here, and the repetition of the same questions involving our restoration of seized property following a treaty of peace, it is impossible to imagine any "type" by way of duplication of the facts relative to our business as evidenced in this case.

As stated in *Deputy* v. *du Pont*, 308 U. S. 488, 496:

> "One of the extremely relevant circumstances is the *nature and scope of the particular business* out of which the expenses in question accrued." (Italics added.)

Our business was the performance of contracts under facts peculiar to a particular situation. Certainly anybody else who confronted the same facts would find the same kind of contracts as a "type," and would have to perform the business in the very same way as a "type." It was typical of our *contracts,* to bear the expenses, and the performance of those contracts *was our business.*

II.

THE COURT EN BANC.

Respondent argues by brief that the circuit judges are appointed to "the *Court*," as distinct from the judicial circuit. The opinion of Judge Biggs says much the same, with mention (R. 56) of an Act of 1936 which directed the President to add a fifth judge in the third circuit: "to appoint an additional judge of the United States Circuit Court of Appeals for the Third Circuit."

The eminent Judge states (R. 56) by comment thereon:

> "This act clearly contemplated an addition to the court as well as to the number of circuit judges in the circuit and confirms the construction of the statute which we have adopted."

If the Judge's search had been more thorough, he would have found that the Act of 1936 which he quoted *is the only instance* of such manner of expression relative to the Third Circuit. It represents an exception, a slip of the tongue, careless language that stands contrary *to every other Act* (except for one) authorizing the appointment of additional circuit judges in all other circuits. (See U. S. C. A., Title 28, Section 213, with supplement by Cumulative Annual Pocket Part.)

That the language in that 1936 Act was an oversight, without intention, is evident by Acts *after 1936*, which provided for additional judges in other circuits:

> "The President is hereby authorized to appoint by and with the consent of the Senate, two additional judges for the ninth judicial circuit." (April 14, 1937, C. 80, 50 Stat. 64.)

> "The President is authorized to appoint by and with the advice and consent of the Senate, four additional circuit judges, one for each of the following judicial circuits: Second, fifth, sixth, and seventh." (May 31, 1938, C. 290, Sec. 1, 52 Stat. 584.)

"The President is authorized to appoint, by and with the advice and consent of the Senate, three additional circuit judges as follows:

(a) One for the sixth circuit;
(b) Two for the eighth circuit." (May 24, 1940, C. 209, Sec. 1, 54 Stat. 219.)

The Third Circuit comprised three circuit judges until an Act of June 10, 1930 (C. 438, 46 Stat. 538) provided:

"The President is authorized to appoint, by and with the advice and consent of the Senate, an additional circuit judge for the third judicial circuit."

Every preceding Act authorizing additional circuit judges was in similar language. Every like Act after 1936 has been in that same language. (There was one other exception by an Act of 1935.)

That the Act of 1936 evidenced somebody's clerical error appears too clear for discussion, bearing in mind that the reason for all those additional circuit judges was not to enlarge courts, but to permit more expeditious decisions in congested dockets by the three-judge-courts prescribed by Judicial Code, Section 117.

Respondent's counsel (the Department of Justice) might freely have examined the Annual Reports of the Attorney General to verify that reason for recommendation of appointment of additional judges. Did the Attorney General ever recommend amendment to Section 117 so as to provide for "a court of seven judges in the Ninth Judicial Circuit," or "a court of five judges in the Third Judicial Circuit," and so on? Of course not, because the only reason for the additions was to make available more judges in respective circuits for sitting as courts in rotation *by three judges.*

If it were true that the authorization and appointment of additional judges makes "the court" comprise all the judges in respective circuits, then Section 117 must stand repealed by implication, and hearings by courts of three

judges stand without authority except in the First and Fourth Circuits. Then seven judges must sit as the court *in all cases* in the Eighth and Ninth Circuits, five judges in the Third Circuit; and, if judges cannot attend sessions, vacancies must be by assignment of district judges. And, what becomes of the provision "of whom two shall constitute a quorum"? (Judicial Code, Section 117.)

Can anybody conceive of Congress declaring that "two shall constitute a quorum" if the Court in the Eighth and Ninth Circuits must comprise *seven judges?*

The correct conclusion appears to be that "a court" presides for hearing and decision in a specific "case or controversy." The composition of such Court is found from Congressional direction regarding the judges who are qualified to preside in according the litigants their "day in Court."

In the Circuit Courts of Appeals, those qualified judges are found in circuit judges, Circuit Justices, and in district judges, under designated conditions.

A court exists only relative to the respective litigants in a particular case or controversy. Apart from actual litigants, it is impossible to conceive of "a court," except as a potentiality for future resort.

Congress has prescribed circuit courts of appeals as comprising three qualified judges. Until Congress declares otherwise, there is no authority in the circuit judges to create courts of a greater number than three judges.

That the circuit judges themselves question their authority in that regard is evident from the bills which they have advocated in the House and the Senate with present pendency.

At the hearings on S. 1053 before a subcommittee of the Committee on the Judiciary United States Senate on April 23, 1941, judges were the witnesses. In the published report at page 40, Judge Groner stated:

> "* * * The question has been discussed in the conference of judges three or four times * * * and there was a difference of opinion. Judge Biggs up in Del-

aware is of the opinion that it can be done, and did do it, and his judges concurred with him. They sat in two or three cases recently. I think Judge Hand expressed some doubt as to whether it could be done, and some other judges, I forget how the vote went around, or the discussion went around, *but there was a very decided opinion that it could not be done* * * *" (Italics added.)

The S. 1053 was introduced in the Senate a day or so after our Petition for Certiorari was filed.

We recite these facts for such "weight" as the "very decided opinion" of the Conference of Judges may merit.

Respectfully submitted,

EDMUND S. KOCHERSPERGER,
Counsel for Petitioner,
811 Investment Building,
Washington, D. C.